Supreme Court, U.S.
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84-282

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

CHARLES D. KNOWLES, SR. and
CHARLES D. KNOWLES, JR.,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

QUESTION PRESENTED FOR REVIEW

Whether this court should resolve the conflict between the federal appellate courts reaching different results on the question:

> WHETHER SECTION 3237(B), TITLE 18, UNITED STATES CODE, REQUIRES A DISTRICT COURT JUDGE TO TRANSFER A CAUSE TO THE DISTRICT IN WHICH THE DEFENDANT RESIDED AT THE TIME THE ALLEGED OFFENSE WAS COMMITTED SO THAT THE DEFENDANT MAY BE TRIED IN THE DISTRICT IN WHICH HE WAS RESIDING AT THE TIME THE ALLEGED OFFENSE WAS COMMITTED WHERE THE OFFENSE INVOLVES USE OF THE MAILS AND IS AN OFFENSE DESCRIBED IN SECTION 7201, TITLE 26, UNITED STATES CODE?

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals, denying the petitioners' petition for leave to file a petition for writ of mandamus and/or prohibition, or both, and denying the petitioners' petition for writ of mandamus and/or prohibition, or both, is attached hereto as Exhibit "A". The order, denying the petitioners' motions for change of venue, by United States District Court Judge Roger Vinson, is attached hereto as Exhibit "B".

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The order of the Eleventh Circuit Court of Appeals, denying the petitioners' petition for writ of mandamus and/or prohibition to the United States District Court for the Northern District of Florida, was entered on June 29, 1984. This petition for a writ of certiorari was

filed less than sixty (60) days from that date, and the jurisdiction of this court is invoked under the authority of Title 28 U.S.C. §1254(1).

STATEMENT OF THE CASE AND FACTS

The background facts necessary to properly understand the issue raised in this petition, briefly stated are:

A. Course of the Proceedings Below.

On May 30, 1984, the Honorable Roger Vinson, United States District Judge for the District Court of the Northern District of Florida, Panama City Division, entered an order denying the motions of a change of venue filed by the petitioners herein, Charles Daniel Knowles, Sr. and Charles Daniel Knowles, Jr.

This was timely taken to the Eleventh Circuit Court of Appeals on a petition for a writ of mandamus, or writ of prohibition, requesting an order directing the District Court to order the district judge to order a change of venue as required by law. This petition was denied, without opinion, by the Circuit Court on June 29, 1984. This

petition for a writ of certiorari was timely filed thereafter.

B. Relevant Facts Necessary to Determine the Issue Presented.

1. On April 10, 1984, an eight count indictment was filed in the United States District Court, Northern District of Florida, charging petitioners herein with various income tax related criminal offenses.

2. Count I of the indictment charges petitioners herein with criminal conspiracy in violation of Section 371, Title 18, United States Code.

3. Counts V and VI do not relate to petitioners.

4. The remaining counts of the indictment relate to the petitioners herein charging criminal offenses in violation of Section 7201, Title 26, United States Code.

5. Furthermore, Counts II, III, IV, VII, and VIII, charge offenses that

"involve use of the mails".

6. Specifically, Count II and Count IV of the indictment charge Charles D. Knowles, Sr. with offenses that involve the use of the mails in the Southern District of Florida and Count III charges Charles D. Knowles, Sr. with an offense that involves use of the mails in the Northern District of Florida. All counts charge that Charles D. Knowles, Sr. is a resident of the Southern District of Florida.

7. Counts VII and VIII charge that Charles D. Knowles, Jr. is a resident of the Southern District of Florida and charge offenses that involve use of the mails. Count VII charges Charles D. Knowles, Jr. with an offense that involved the use of the mails in the Northern District of Florida, and Count VIII charges Charles D. Knowles, Jr. with an offense that involved the use of the mails in the Southern District of Florida.

8. Petitioners timely filed a motion for change of venue pursuant to Section 3237(b), Title 18, United States Code, that provides as follows:

> "Notwithstanding subsection (a), where an offense is described in Section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

9. Thereafter, Honorable Roger Vinson entered an order denying petitioners' motion for change of venue, a copy of which has been attached as Exhibit "A".

ARGUMENT

Section 3237(b), Title 18, United States Code, provides that:

> "Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

Clearly, the statute entitles petitioners to be tried in the district in which they resided at the time the alleged offense was committed.

It is not disputed that petitioners were residents of the Southern District of Florida at the time that the alleged offense was committed. Even the indictment filed against petitioners alleges that the petitioners were residents of the Southern District of Florida, although the prosecution was begun in the Northern District of Florida.

Five of the six counts that relate to petitioners charge offenses described in Section 7201, Title 26, United States Code, and involves use of the mails. In other words, only one count of the six counts of the indictment against petitioners does not charge an offense that involves use of the mails and described in Section 7201, Title 26, United States Code. Although petitioners may not be entitled to transfer of this cause as to Count I, it is abundantly clear that Section 3237(b), Title 18, United States Code, entitled petitioners to elect

to be tried in the district in which they resided at the time the alleged offense was committed as to the remaining five counts against petitioners.

Although the Honorable Roger Vinson found that only Count VIII alleged that the tax returns were mailed in the Northern District of Florida, a thorough reading of the indictment reveals that the prosecution has charged that the tax returns were mailed from the Southern District of Florida in Count II, Count IV, and Count VIII of the indictment filed against petitioners.

There is a conflict between the various Circuit Courts of Appeal which this court should resolve.

In United States v. United States District for the Southern District of California, 693 F.2d 68 (9th Cir. 1982), the appellate court held that Section 3237 (b), Title 18, United States Code, gave a

defendant charged with substantive tax evasion counts the right to be tried on said counts in the district in which he resided, despite practical advantages in avoiding duplicate trials. The court stated therein:

> . . . We find ourselves compelled by the plain language of the statute to reject the positions taken by the government and the Second Circuit.

Id. at 70.

Although the Second Circuit gave a narrow reading of Section 3237(b) in the case of In Re: United States (Clemente), 608 F.2d (2nd Cir. 1979), cert. denied, 446 U.S. 908, 100 S. Ct. 1838, 64 L.Ed.2d 260 (1980), the Ninth Circuit refused to follow the majority opinion of the Second Circuit. The Ninth Circuit states:

> . . . The overwhelming weight of judicial authority prior to Clemente held that the option was available to defendants whether or not the government relied upon mailing to establish venue.

United States v. United States District Court, for the Southern District of California, supra, at 70.

The Ninth Circuit also recognized the congressional intent of Section 3237(b) and stated as follows:

> We also note that Congress amended Section 3237(b) in 1966, to add willful failure to file tax returns as a crime for which the transfer option would be available. At that time, several courts had reached the conclusion that transfer would be allowed whether or not the government relied upon mailing to lay venue. Not only did Congress fail to address this problem, but the Senate report stated broadly, 'to be sure that the taxpayer has the right to be tried in the district in which he resides, the bill amends present law to provide that he may elect to remove his trial to the judicial district of his residence'.

United States v. United States District Court, for the Southern District of California, supra, at 70.

Clearly, the Ninth Circuit adopted the dissenting opinion of Judge Kearse in

In Re: United States (Clemente), supra. The Ninth Circuit recognized "there are balancing considerations of the expense and inconvenience of defendants, who are presumed to be innocent", which must be weighed in construing Section 3237(b), and that these considerations entitled defendants to a transfer option in cases such as the instant case.

CONCLUSION

WHEREFORE, petitioners pray:

That a Writ of Certiorari issue directing the Eleventh Circuit Court of Appeals to issue either a Writ of Mandamus or a Writ of Prohibition, or Both in the alternative, requiring the Honorable Roger Vinson, Judge of the United States District Court for the Northern District of Florida, to show cause why he should not vacate and set aside his order entered on May 30, 1984, denying these petitioners' motion for change of venue, or that he be

directed to set aside his order entered on May 30, 1984, denying the said motion for change of venue, and that he be ordered to transfer Counts II, III, IV, VII and VIII to the United States District Court, Southern District, for trial of said cause, that pending argument on this petition and final disposition by this court that the Honorable Roger Vinson be ordered to stay further proceedings in the United States District Court in the Northern District of Florida, and for such other or additional relief as the court may find equitable and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served have been served, including the Solicitor General, Department of Justice, Washington, D.C. 20530, by regular U. S. Mail with the foregoing Petition For A Writ of Certiorari, this 10th day of August, 1984.

DANIEL, KOMAREK &
MARTINEC, CHARTERED

By: _____
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(904) 763-6565

ATTORNEYS FOR PETITIONERS
CHARLES D. KNOWLES, SR. and
CHARLES D. KNOWLES, JR.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3399

IN RE:

CHARLES D. KNOWLES, SR. and
CHARLES D. KNOWLES, JR.,

Petitioners.

On Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Northern District of Florida

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Before GODBOLD, Chief Judge, and JOHNSON and HENDERSON, Circuit Judges.

B Y T H E C O U R T:

The petition for leave to file a petition for writ of mandamus and/or prohibition, or both, is DENIED.

IT IS FURTHER ORDERED that the petition for writ of mandamus and/or prohibition, or both, is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

v. MCR 84-209

FRANK W. KNOWLES, CHARLES D. KNOWLES, SR., a/k/a Danny Knowles; CHARLES D. KNOWLES, JR., a/k/a Chuck Knowles.

ORDER

Motions for change of venue have been filed by defendant Charles Daniel Knowles, Sr. (doc. 29, filed April 25, 1984), and by defendant Charles Daniel Knowles, Jr. (doc. 35, filed April 27, 1984). Both of these defendants were arraigned on April 17, 1984, and rely upon Title 18, United States Code, Section 3237(b) as the basis of their respective motions. This statute provides, in pertinent part:

> Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed . . .

Charles D. Knowles, Sr. and Charles D. Knowles, Jr., along with Frank W. Knowles, are charged in an eight count indictment. Count I of the indictment charges all three defendants with conspiracy to defraud the United States in violation of Section 371, Title 18, United States Code. Charles D. Knowles, Sr. is charged in Counts II, III, and IV of the indictment with income tax evasion in violation of Section 7201, Title 26, United

States Code. Charles D. Knowles, Jr. is charged with similar offenses in Counts VII and VIII of the indictment.

The indictment alleges that Charles D. Knowles, Sr. and Charles D. Knowles, Jr. are residents of the Southern District of Florida, while Frank W. Knowles is alleged to be a resident of the Northern District of Florida. The indictment also alleges that the events that are the subject of all eight counts of the indictment took place primarily in the Northern District of Florida, with some limited activity in the Southern District of Florida and in the State of Louisiana.

Since Count I of the indictment charges all of the defendants with conspiracy to defraud the United States in violation of Section 371, Title 18, United States Code, it is quite clear that Section 3237(b) is totally inapplicable to this count of the indictment. The motions are DENIED, therefore, as to Count I.

With regard to the remaining counts of the indictment for each respective defendant, there is a conflict of authority. Both the Second Circuit and the Fourth Circuit Courts of Appeal have determined that, under similar circumstances, transfers to a defendant's district of residence is not required. United States v. Clemente, 608 F.2d 76 (2d Cir. 1979), cert.den., 446 U.S. 908 (1980), In Re: United States, 706 F.2d 494 (4th Cir. 1983). On the other hand, the Ninth Circuit has construed the statutory language as literally requiring a transfer in this type of income tax evasion case, if requested by the defendant, regardless of what the intent of Congress may have been or the consequences and cost to the witnesses, all the parties, and the Government.

In Clemente, the majority of the panel of the Second Circuit found the words "where an offense involves use of the mails"

ambiguous, and construed them as confined to remedy the perceived evil that led to the enactment of that subsection. The perceived evil was that the many taxpayers who are required to file income tax returns in an office of the Internal Revenue Service outside the district of their residence could be prosecuted in the district of the filing, rather than in the district where they resided. Here, venue in this case does not appear to be, in any way, dependent upon any mailing. In fact, all of the pertinent counts of the indictment, except Count VIII, allege that the tax returns were mailed from the Northern District of Florida. All of the major events of the alleged conspiracy took place in the Northern District of Florida.

In this case, the severance and transfer to the Southern District of Florida of the Section 7201 charges against these two defendants would necessitate two trials,

instead of one. The attorneys in this case have advised the court that they anticipate that the trial will take anywhere from two weeks up to as long as six weeks. It will be difficult to coordinate two separate, lengthy trials, within the requirements of Chapter 208, Title 18, United States Code. Further, a trial in the Southern District of Florida would hardly serve the convenience of the many witnesses from the Northern District of Florida.

Since the indictment alleges that these defendants utilized means other than the use of the mails to violate Section 7201, the court agrees that the narrow construction of the words "where an offense involves use of the mails" of the Second and Fourth Circuits is faithful to the result intended by Congress, and avoids the judicial inefficiency in duplicative proceedings

that would be the inevitable result of the Ninth Circuit's construction. Accordingly, the defendants' motions for change of venue are hereby DENIED.

DONE AND ORDERED this 30th day of May, 1984.

/s/ Roger Vinson

ROGER VINSON
United States District Judge

Office-Supreme Court, U.S.
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CLERK

No. 84-282

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES D. KNOWLES, SR., AND
CHARLES D. KNOWLES, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
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Washington, D. C. 20530
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BEST AVAILABLE COPY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in refusing to review, before trial, the district court's denial of their motions for a change of venue. The substantive question petitioners seek to present is identical to that presented in *Nardone* v. *United States*, No. 83-5266, in which certiorari was denied on November 28, 1983, and in *Eisenberg* v. *United States*, No. 83-1339, and *Dorison* v. *United States*, No. 83-1340, in which certiorari was denied on May 14, 1984.

Petitioners were charged in six counts of an eight-count indictment returned in the United States District Court for the Northern District of Florida with conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and attempted income tax evasion, in violation of 26 U.S.C. 7201 (Pet. App. B2-B3). The indictment grew out of petitioners' alleged attempts to conceal, and failure to report,

income from narcotics trafficking. After their arraignment, petitioners, relying on 18 U.S.C. 3237(b), moved for a change of venue to the Southern District of Florida, the district in which they resided (Pet. App. B1, B3). The district court denied their motions (Pet. App. B1-B7), following the decisions of the Second Circuit in *In re United States (Clemente)*, 608 F.2d 76, 80-81 (1979), cert. denied, 446 U.S. 908 (1980), and of the Fourth Circuit in *In re United States (Nardone)*, 706 F.2d 494 (1983), cert. denied, No. 83-5266 (Nov. 28, 1983). Those decisions limited the applicability of Section 3237(b) to cases in which a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the district of the taxpayer's residence. Here, the court determined (Pet. App. B5) that venue in the Northern District of Florida did not appear to be predicated in any way on a mailing, but was predicated rather on the fact that all the major events of the alleged conspiracy had taken place in that district.

Upon the district court's denial of their motions, petitioners filed with the court of appeals a petition for a writ of prohibition or in the alternative for mandamus. The Eleventh Circuit denied their petitions on June 29, 1984, without opinion (Pet. App. A1).

Petitioners contend that the district court erred in denying their motion for a change of venue, making the same arguments that the petitioners in *Clemente, Nardone, Eisenberg*, and *Dorison* made. But such an interlocutory ruling in a criminal case is not appealable prior to final judgment, cf. *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), and the court of appeals properly refused petitioners' effort to circumvent this restriction by seeking

extraordinary relief. Petitioners have now been convicted,[1] and their convictions have not yet been reviewed by the court of appeals. They may raise their venue contentions, along with any others they may have, on appeal from the final judgments of conviction. If their convictions are affirmed, petitioners will then be able to present their contentions to this Court in petitions for writs of certiorari seeking review of final judgments against them. Review of the court of appeals' decision now would thus be premature.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1984

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[1]On August 23, 1984, while the instant petition was pending, petitioner Knowles, Sr., was convicted on all three counts charging him with income tax evasion; petitioner Knowles, Jr., was convicted on one of two counts charging him with income tax evasion; and both petitioners were convicted on the conspiracy count.

[2]We note that, effective July 18, 1984, Congress amended 18 U.S.C. 3237(b) to make it clear that a defendant is entitled to a transfer of a prosecution to the district of his residence only where venue in another district is based solely on a mailing to the IRS. Tax Reform Act of 1984, Pub. L. 98-369, § 162, 98 Stat. 494. See H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1002-1003 (1984); S. Rep. 98-225, 98th Cong., 1st Sess. 413-414 (1983).

DOJ-1984-09